

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - X

3   TOWN OF CASTLE ROCK, COLORADO,           :

4                               Petitioner;               :

5                               V.                               :   No. 04-278

6   JESSICA GONZALES, INDIVIDUALLY           :

7   AND AS NEXT BEST FRIEND OF HER           :

8   DECEASED MINOR CHILDREN, REBECCA       :

9   GONZALES, KATHERYN GONZALES, AND       :

10   LESLIE GONZALES.                               :

11   - - - - - X

12   Washington, D.C.

13   Monday, March 21, 2005

14               The above-entitled matter came on for oral

15   argument before the Supreme Court of the United

16   States at 10:01 a.m.

17   APPEARANCES:

18   JOHN C. EASTMAN, ESQ., Orange, California; on behalf

19       of the Petitioner.

20   JOHN P. ELWOOD, ESQ., Assistant to the Solicitor

21       General, Department of Justice, Washington,

22       D.C.; on behalf of the United States, as amicus

23       curiae, supporting the Petitioner.

24   BRIAN J. REICHEL, ESQ., Broomfield, Colorado; on

25       behalf of the Respondents.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We'll hear  
3 argument on number 04-278, the Town of Castle Rock  
4 versus Jessica Gonzales. Mr. Eastman.

5 ORAL ARGUMENT OF JOHN C. EASTMAN

6 ON BEHALF OF PETITIONER

7 MR. EASTMAN: Mr. Chief Justice and may it  
8 please the Court:

9 What happened here is undeniably tragic.  
10 A father shot and killed his own daughters. He was  
11 under a restraining order, so the issue for this  
12 Court is whether the order restraining Mr. Gonzales  
13 also gave to Mrs. Gonzales and her children a  
14 property interest put against the police giving  
15 Mrs. Gonzales an entitlement to the arrest of her  
16 estranged husband.

17 More precisely, the issue is whether the  
18 State of Colorado intended to create such a property  
19 interest.

20 JUSTICE O'CONNOR: Tell us how we know  
21 exactly how much discretion the State of Colorado  
22 wanted to give to the police.

23 MR. EASTMAN: Well, Justice O'Connor --

24 JUSTICE O'CONNOR: Without a statute that  
25 uses the word shall enforce. Do we know how Colorado

1 has interpreted that?

2 MR. EASTMAN: Well, they have in other  
3 cases, as we note in our brief, that the word shall  
4 is not always mandatory, particularly here, I think,  
5 Justice O'Connor, when we have such a backdrop of law  
6 enforcement discretion.

7 JUSTICE O'CONNOR: Well, are there  
8 Colorado cases that tell us how we should read those  
9 statutes?

10 MR. EASTMAN: Not in particular on this  
11 statute. They only -- the Colorado case law on the  
12 word shall says that you have to read it in context  
13 of the entire statute. And here the word shall is  
14 used several different places pointing several  
15 different directions in the statute.

16 JUSTICE SCALIA: So do you concede that if  
17 shall means shall, that it creates a property  
18 interest?

19 MR. EASTMAN: No, Justice Scalia, I do  
20 not. There is a long way between giving direction,  
21 even mandatory direction, to law enforcement and  
22 creating a property interest. I think that was the  
23 essence of this Court's holding in Sandin. And it's  
24 that distinction that even if you read shall in these  
25 statutes as requiring a particular outcome, and we

1 don't --

2 JUSTICE STEVENS: Mr. Eastman, would you  
3 comment on the extent of deference that we should  
4 give to the court of appeals' interpretation of  
5 Colorado while in view of what we said in Bishop  
6 against Wood?

7 MR. EASTMAN: Yes, I don't think here,  
8 because it's not just an application of Colorado law  
9 here. We have identical statutes in 19 or 20  
10 different states around the country. And what you  
11 do --

12 JUSTICE STEVENS: But the Colorado statute  
13 is the one that's controlling in this case and  
14 normally, at least according to Bishop against Wood,  
15 we defer to the interpretation of the court of  
16 appeals as the issue of state law.

17 MR. EASTMAN: Well, what you're asking is  
18 that the court of appeals that created -- that read  
19 this statute shall, without any Colorado court  
20 interpretation, and did so without any greater  
21 indication from the Colorado legislature, that it  
22 intended more than just to give direction to police.  
23 It intended to create a property interest.

24 I understand the question from Bishop  
25 versus Wood, but I don't think we can defer to the

1 Tenth Circuit here in creating something that  
2 Colorado did not intend to create.

3 JUSTICE STEVENS: Of course, that's the  
4 issue, whether Colorado intended to create it.

5 MR. EASTMAN: But I think there is a big  
6 difference. I mean --

7 JUSTICE STEVENS: The reading in Bishop  
8 against Wood was really counterintuitive also, as the  
9 dissenters pointed out, as you would agree, I think.

10 MR. EASTMAN: Yes, and I think when you're  
11 looking at a statute such as this, that is invoking  
12 the federal court's -- I mean, what we're using is a  
13 state law to invoke federal protections. And I think  
14 it's that deference to the state that I think is more  
15 critical. And I don't think you can allow the  
16 federal courts to make that decision when Colorado  
17 itself has not been -- has been as ambiguous as it  
18 is. I think we need a clearer statement.

19 JUSTICE GINSBURG: Did you suggest to the  
20 federal court that it certify the question of the  
21 meaning of Colorado law to this Colorado Supreme  
22 Court?

23 MR. EASTMAN: No, we did not, because I  
24 don't think the statute gets us over the hurdle to  
25 make that even necessary. There is nothing in this

1 statute that is intended -- that uses the language of  
2 property interest or entitlement. I think if this  
3 Court would look to its decision in Gonzaga, for  
4 example, in --

5 JUSTICE SCALIA: Wait, wait. I thought we  
6 were just talking here about state law as to whether  
7 shall means shall. Do you think that it's a matter  
8 of state law whether, if it does mean shall, it  
9 creates a property interest for purposes of the  
10 Federal Constitution?

11 MR. EASTMAN: No, Justice Scalia, I don't.

12 JUSTICE SCALIA: You don't concede that  
13 that's a state question at all?

14 MR. EASTMAN: No. And what we're talking  
15 about --

16 JUSTICE STEVENS: Well, isn't that what we  
17 squarely held in Bishop?

18 MR. EASTMAN: Well, what we have to look  
19 at is whether, first, the state, under Roth, intended  
20 to create a property interest rather than just giving  
21 mandatory direction to its officers. And I think the  
22 critical question there is what the default rule  
23 ought to be on a statute that is not clear on that  
24 question.

25 And I think Roth tells us that for

1 purposes of federal constitutional law, the default  
2 cannot be that we assume the state created a property  
3 interest, at least in this kind of nontraditional  
4 property interest. And I think it's important to  
5 focus on what kind of property interest we're talking  
6 about.

7 JUSTICE BREYER: Suppose shall does mean  
8 shall. Fine. But you might have a statute that says  
9 the fire department shall respond to fires, the  
10 police department shall respond to crimes, the Army  
11 shall respond to attacks.

12 Even the word shall doesn't necessarily  
13 mean that this is the kind of interest that, like  
14 property, the Duke of Rutland relied upon Blackacre,  
15 that welfare recipients rely upon continuing to  
16 receive money.

17 What is it about this that makes it like  
18 property, even if shall does mean shall?

19 MR. EASTMAN: Justice Breyer, I agree, and  
20 the difference between even mandatory language  
21 directing law enforcement to behave in a certain way  
22 is a far cry from actually creating a property  
23 interest in Mrs. Gonzales herself.

24 This Court in Sandin held that in the  
25 prison context, and I think the analogy in this



1 Court's implied right of action cases such as Gonzaga  
2 is a good one.

3 In order to take a statute and try and  
4 find a property interest, we would want to have it  
5 phrased in terms of the beneficiary rather than the  
6 person restrained. We would want to see an  
7 actionable entitlement created. None of that is  
8 here. And I think that --

9 JUSTICE GINSBURG: But if you compare it  
10 to -- this is a court order and it's enforceable.  
11 There is no question about that, is there? This is a  
12 court order that enforcement officials carry out.  
13 How does it differ from, say, a money judgment and  
14 executing -- levying execution on property? Judgment  
15 creditor says, here is my judgment, marshal, sheriff,  
16 go out and find some of the defendant's property.

17 MR. EASTMAN: Well, JUSTICE GINSBURG, you  
18 know, the analogy we cite in our reply brief and the  
19 U.S. marshal statute, 42 U.S.C. 1990 that says that  
20 there is a right in the beneficiary to have a warrant  
21 issued. And if the marshal refuses to do that, that  
22 he can be challenged and held to a thousand dollar  
23 fine for the benefit of the person whose arrest  
24 warrant he was supposed to serve.

25 Now, even that doesn't quite go far enough

1 because there is not a private right of action by the  
2 beneficiary about a warrant to bring the suit  
3 directly. But at least that kind of statute is  
4 getting closer to acknowledging a property interest.

5 This is enforceable against Mr. Gonzales,  
6 and Ms. Gonzales could go back in and get a contempt  
7 proceeding. I know here, after the fact, that's not  
8 going to do any good. But the restraining order is  
9 issued against Mr. Gonzales. It's not issued to the  
10 police. And all we have then is how its violation by  
11 Mr. Gonzales will be enforced.

12 JUSTICE GINSBURG: But isn't that true of  
13 all injunctive orders, they're not issued to the  
14 police. And yet the police -- don't the police have  
15 an obligation to enforce that?

16 MR. EASTMAN: To my knowledge, we've never  
17 held that the police have an actionable obligation to  
18 enforce them. But the state --

19 JUSTICE SOUTER: But wouldn't you concede  
20 that in the case of the injunction in which there is  
21 a specific order in relation to a specific  
22 respondent, that the police have much less discretion  
23 than they would have when there is in effect a  
24 general statute saying, respond in these kinds of  
25 situations?

1                   MR. EASTMAN: Justice Souter, they still  
2     have a great deal of discretion here. The statute  
3     says reasonable means of enforcement.

4                   JUSTICE SOUTER: In the case of the  
5     statute that we're talking with, but they don't have  
6     that kind of discretion, do they, in JUSTICE  
7     GINSBURG's example? What I'm getting at is, if  
8     you're going to take the example that JUSTICE  
9     GINSBURG has given you as equivalent to the example  
10    that we have before us, I think you're fighting  
11    uphill and I don't think you have to do that.

12                  MR. EASTMAN: Well, let me take your  
13    invitation, then, and respond back. I mean, if the  
14    terms of the restraining order cut out all of the  
15    discretion whatsoever and that they specifically are  
16    written in terms of the property interest creates an  
17    entitlement in the beneficiary of the restraining  
18    order, as against not just the person restrained or  
19    the person whose property is going to be attached,  
20    but an entitlement to enforcement by the police  
21    itself, then I think we would be on the step toward  
22    creating a property interest.

23                  The Colorado statute here does none of  
24    those things. It continues to give the police a  
25    great deal of discretion. Reasonable means --

1 JUSTICE GINSBURG: But is discretion --  
2 does discretion on the means to use include  
3 discretion to do nothing?

4 MR. EASTMAN: Well, it includes a finding  
5 of probable cause. It includes a -- seek an arrest  
6 or make an arrest or seek a warrant arrest when the  
7 arrest is impractical. If the arrest is impractical,  
8 such as when --

9 JUSTICE GINSBURG: But were any of those  
10 determinations made here?

11 MR. EASTMAN: Well, we don't know. We  
12 don't know because this case comes up here on a  
13 motion to dismiss. All we have are the allegations.  
14 The allegations are that they didn't enforce the  
15 restraining order, all right? But we don't know  
16 whether it's because they made a determination of no  
17 probable cause, whether there was probable cause but  
18 because he wasn't in the jurisdiction --

19 JUSTICE GINSBURG: So are you requesting  
20 that there are insufficient fact findings here, so it  
21 should be returned --

22 MR. EASTMAN: No, JUSTICE GINSBURG,  
23 because what we're saying is that there is not a  
24 property interest at all and it doesn't matter, even  
25 if these allegations are true, there is no underlying

1 property interest that would invoke the procedural  
2 protections of the Fourteenth Amendment.

3 JUSTICE BREYER: Mr. Eastman, can I ask  
4 you this question? Supposing this case came to us  
5 through the Colorado state system instead of through  
6 the federal system, and the Colorado Supreme Court  
7 had written precisely the same opinion that the Tenth  
8 Circuit ruled. Would we have jurisdiction to  
9 overturn their holding that there was a property  
10 interest here?

11 MR. EASTMAN: JUSTICE STEVENS, you're  
12 asking whether, for purposes of federal  
13 constitutional law, the state court decision that  
14 Colorado had created a property interest is  
15 dispositive. And I'm not sure it is, but --

16 JUSTICE STEVENS: Then your answer is no,  
17 we would not have jurisdiction in that event.

18 MR. EASTMAN: Well, no, I was saying that  
19 yes, you would, because what we're talking about is  
20 looking to the state legislature on whether they've  
21 created a property interest for purposes of federal  
22 law.

23 JUSTICE STEVENS: We could say that they  
24 had misconstrued Colorado law? I don't think you  
25 really mean that.

1 MR. EASTMAN: Okay.

2 JUSTICE STEVENS: But I think you meant --

3 JUSTICE SCALIA: Perhaps what you mean is  
4 that what is a property interest for purposes of  
5 Colorado law, if Colorado chooses to nominate some  
6 utterly zany thing of property interest, it doesn't  
7 necessarily mean that it's a property interest for  
8 purposes of the Federal Constitution.

9 MR. EASTMAN: Justice Scalia, I'm happy to  
10 do that.

11 JUSTICE STEVENS: You can do that, but you  
12 won't find any cases making that point.

13 MR. EASTMAN: No, you won't, but it makes  
14 perfect sense --

15 JUSTICE SCALIA: I don't think you need a  
16 case for that, do you?

17 MR. EASTMAN: No, but it makes perfect  
18 sense.

19 JUSTICE STEVENS: But you have cases  
20 saying the contrary. That's the problem.

21 MR. EASTMAN: What we want to find out is  
22 whether the Colorado --

23 JUSTICE SCALIA: Do we have any cases  
24 involving a zany property interest having been found  
25 by a state? I don't think we have any.

1                   MR. EASTMAN: We don't even have any cases  
2 involving a property interest to enforcement against  
3 somebody else. All we have are cases to the  
4 contrary. Linda R.S., for example, this Court held  
5 that there is no right to arrest or enforcement  
6 against somebody else.

7                   And so I think at least in the context of  
8 these very non-zany property interest claims, that we  
9 need to have a pretty clear statement, not even from  
10 the Colorado courts, but from the legislature itself  
11 that the legislature intended, as a matter of state  
12 policy, to have a property interest created and all  
13 of the consequences that would flow from that.

14                  JUSTICE GINSBURG: May I stop you? You  
15 cited that Linda R.S., whatever, I thought that was a  
16 standing case saying it's not going to do you any  
17 good to have them locked up in jail if what you want  
18 to do is get money from him.

19                  MR. EASTMAN: It was, but the case has  
20 been relied on by several subsequent decisions  
21 including in the Second Circuit in the Attica case,  
22 inmates of Attica, for the proposition that there is  
23 just simply no right to an enforcement against  
24 somebody else, that there is no entitlement.

25                  Now, I'm not saying that the Colorado

1 legislature never could create such an entitlement,  
2 but given the backdrop of Linda R.S., and also given  
3 the backdrop of traditional law enforcement  
4 discretion, I think we need a much clearer statement  
5 from the Colorado legislature itself, both that it's  
6 written in terms of the beneficiary -- getting her an  
7 entitlement against the police, rather than in terms  
8 of what the person restrained is.

9 JUSTICE O'CONNOR: Mr. Eastman, assuming  
10 for the moment there is no due -- procedural due  
11 process right here, on the facts of this case, does  
12 Colorado law provide any alternative remedy for  
13 Mrs. Gonzales?

14 MR. EASTMAN: Yes, Justice O'Connor, it  
15 does.

16 JUSTICE O'CONNOR: And what would that be?

17 MR. EASTMAN: There are several remedies.  
18 In the first instance, any violation of a restraining  
19 order, she can petition the court for a contempt  
20 order, even against the police. If their conduct was  
21 willful and wanton --

22 JUSTICE O'CONNOR: So she could presumably  
23 ask for some relief under that notion, against the  
24 police and possibly the town?

25 MR. EASTMAN: Against the police and --



1 not the town. The town has absolute immunity but  
2 against the police under the tort statute, the police  
3 are not immune if their conduct is willful and  
4 wanton.

5 And I think this Court in DeShaney  
6 addressed that very question when it looked like if  
7 the state wanted to create an interest here, that it  
8 could do so by modifying the --

9 CHIEF JUSTICE REHNQUIST: You say the  
10 tort statute means something like the Federal Tort  
11 Claims Act. Does Colorado have something like that?

12 MR. EASTMAN: It does. And there is a  
13 Colorado Governmental Immunity Act that gives  
14 immunity to police except when their conduct is  
15 willful and wanton. And so that tort remedy does  
16 exist and if the Colorado legislature wanted to lower  
17 the threshold on that and make it negligent omissions  
18 or what have you, whatever the allegations are, they  
19 could do so.

20 The fact that they haven't done so I think  
21 is a pretty strong indication that they did not  
22 intend to create a property interest here.

23 If there is a property interest -- let me  
24 just say one minute about the procedures that were  
25 given, and then I'll reserve the remainder of my

1 time. At most we would have here, if there is a  
2 property interest, is the opportunity for  
3 Mrs. Gonzales to tell the police that she believed  
4 the restraining order was violated and that they  
5 responded to her however they did.

6 She received whatever process might be due  
7 assuming we have a property interest here. If there  
8 are no more questions, I'll reserve the remainder of  
9 my time.

10 CHIEF JUSTICE REHNQUIST: Very well,  
11 Mr. Eastman. Mr. Elwood, we'll hear from you.

12 ORAL ARGUMENT OF JOHN P. ELWOOD

13 ON BEHALF OF THE UNITED STATES,

14 AS AMICUS CURIAE, SUPPORTING PETITIONER

15 MR. ELWOOD: Mr. Chief Justice and may it  
16 please the Court:

17 For two reasons the holders of restraining  
18 orders lack a property right to police enforcement of  
19 those orders. First, Respondent's claim has to be  
20 evaluated in light of the fundamental background  
21 principles that private citizens lack a judicially  
22 cognizable interest in arrest and in prosecution of  
23 third parties. And that executive decisions not to  
24 enforce criminal statutes are presumptively beyond  
25 the scope of judicial review.

1                Nothing in the Colorado statute reflects  
2     an intent to depart from those background  
3     presumptions and to create an individual right to  
4     enforcement. Unlike statutes where this Court has  
5     recognized a protected property interest, the  
6     provisions at issue here did not regulate the  
7     Plaintiff or Respondent, but rather regulate a third  
8     party. And the provisions do not mention the  
9     restraining order holder, much less state that she  
10    has an entitlement to review.

11              In addition, the provisions do not afford  
12    the holder of restraining orders procedural  
13    protections or judicial review of the sort that this  
14    Court --

15              JUSTICE GINSBURG: What good is -- what  
16    does the restraining order do, then, other than give  
17    her a right to sue the person who is restrained for  
18    contempt?

19              MR. ELWOOD: I think it does two main  
20    things. First of all, it gives her rights against  
21    her husband which are enforceable through contempt  
22    and are enforceable by asking the police to enforce  
23    them.

24              And second, which has the benefit -- it  
25    has the effect basically of creating a new arrest

1 statute that lowers the threshold of what conduct is  
2 criminal from something that would be a freestanding  
3 crime to basically just violating one of the terms of  
4 the order. And that is the interest the restraining  
5 order gives her.

6 JUSTICE GINSBURG: But only to ask the  
7 police and the police are not obliged to respond.

8 MR. ELWOOD: That is correct. She has the  
9 ability to ask the police to enforce the order, but  
10 the police have discretion, under our reading of the  
11 statute, not to enforce the --

12 JUSTICE STEVENS: Do the police have any  
13 duty at all, in your view?

14 MR. ELWOOD: The police -- I don't believe  
15 that the police have any sort of actionable duty. I  
16 think that what the statute creates is basically it's  
17 a direction from the legislature that this is what  
18 they want them to do.

19 JUSTICE STEVENS: Could the police just  
20 issue an order saying ignore all orders of this kind?

21 MR. ELWOOD: I think that if they were to  
22 do that, I do not think that there would be sort of  
23 any individual right to challenge that. I think that  
24 they would be adopting a policy decision that would  
25 probably be different than the one the Colorado

1 legislature has --

2 CHIEF JUSTICE REHNQUIST: That's the sort  
3 of aggressive sort of thing that the Colorado courts  
4 could conclusively decide.

5 MR. ELWOOD: That's something the Colorado  
6 courts decide, and it's something that would be --  
7 that could be addressed through the political process  
8 as well.

9 JUSTICE KENNEDY: Are there any extreme  
10 cases we could imagine where the police have a duty  
11 to protect the citizen? The policeman sees four  
12 people beating up on the victim, no race involved,  
13 and he just enjoys watching the fight. Does he have  
14 a duty under the Constitution to intervene?

15 MR. ELWOOD: I think any duty that there  
16 would be would be a substantive duty. And this Court  
17 indicated in DeShaney that it would require basically  
18 state creation of the harm or state increasing the  
19 vulnerability of the person. So for example --

20 JUSTICE KENNEDY: Did DeShaney stand for  
21 the proposition there could never be an affirmative  
22 duty to intervene, under what you're talking about  
23 the Constitution here?

24 MR. ELWOOD: I think it would be, in a  
25 case, for example, where a prisoner was handcuffed in

1 his cell with a cell mate who the authorities knew to  
2 be basically interested in harming him. Because they  
3 had affirmatively restrained him, I think that that  
4 would be a case where the state had created the  
5 danger or increased the vulnerability.

6 So I think there is something left to the  
7 requirement of police protection substantively under  
8 DeShaney.

9 JUSTICE KENNEDY: But there has to be some  
10 state -- the state has to have created the risk  
11 somehow?

12 MR. ELWOOD: Under DeShaney, the state has  
13 to have created the risk or increased the  
14 vulnerability of the person.

15 Now, in addition to the fact that the  
16 Colorado statute does not speak to the Plaintiff, it  
17 essentially speaks to the restrained party. And  
18 under -- as Mr. Eastman mentioned, under Gonzaga and  
19 this Court's 1983 cases, that when a statute speaks  
20 in terms of the regulated party instead of the  
21 protected party, there is no implication of an intent  
22 to create a federal right.

23 And I think that that principle would  
24 apply even more clearly in the context of the state  
25 rights, because there there is a question of imposing

1 federal liability which shouldn't really be done in  
2 the absence of an indication that the state really  
3 meant to do that.

4 Another reason is -- not to assume that  
5 there is a property right here, is that the state  
6 statute does not create any sort of procedural  
7 remedies or judicial remedies which this Court has in  
8 the past taken as an indication that the state really  
9 did mean to create a protective right.

10 JUSTICE SCALIA: What's your response to  
11 the fact that the Tenth Circuit found otherwise and  
12 that we usually defer?

13 MR. ELWOOD: I think our response would be  
14 that it's not simply -- well, first of all, I don't  
15 want to make too much of the fact that it's obviously  
16 a very close question of state law because the Tenth  
17 Circuit was divided by a single vote.

18 But even aside from that, you basically  
19 have to adopt not simply a question of what the state  
20 law says, but what the federal courts are going to do  
21 with it. And we are of the opinion that given what a  
22 tremendous departure it would be, what a procedural  
23 innovation it would be to give complaining witnesses  
24 essentially a right in the process, that in the  
25 absence of a very clear statement, the federal court

1     should not imply a right or imply -- should not  
2     infer, rather, that the state legislature intended to  
3     create a right.

4             So essentially, what we're asking for is a  
5     clear statement rule. And in the absence of a clear  
6     statement, we should presume that the --

7             JUSTICE STEVENS: Do you agree that if  
8     this case stands with the state system, we would have  
9     to accept their holding on the property right issue?

10            MR. ELWOOD: Obviously, I think there  
11     would be a much closer question at a minimum. There  
12     may be something to the fact that we should -- this  
13     is the sort of thing we would want a statement from  
14     the Colorado legislature.

15            JUSTICE STEVENS: No, let's say the  
16     Supreme Court has said, this is what the statute  
17     means and so forth and so on, wouldn't that be  
18     binding on this?

19            MR. ELWOOD: I think it would be binding.  
20     I mean, it would still be the federal question of  
21     whether that applied federal law correctly. But  
22     given that it's basically a question of what is a  
23     state property right, yes.

24            JUSTICE STEVENS: Or whether the question  
25     of property right -- the property right issue is not



1 a question of federal law, it is a question of state  
2 law.

3 MR. ELWOOD: That is correct. That is  
4 correct. There is something of a federal overlay to  
5 sort of correct that --

6 JUSTICE BREYER: What did they hold in the  
7 Tenth Circuit? I mean, shall could be mandatory.  
8 You can have a mandatory duty, but that doesn't mean  
9 that the victim has a legal right to enforce that  
10 duty.

11 MR. ELWOOD: That's absolutely correct,  
12 Justice Breyer.

13 JUSTICE BREYER: So what did they hold in  
14 the Tenth Circuit in respect to that?

15 MR. ELWOOD: Basically they said that  
16 because it is -- because the statute was mandatory,  
17 they basically leapt from that to an inference that  
18 because it was mandatory, it was a duty that she  
19 could enforce. But there is no tradition in that --

20 JUSTICE BREYER: They should reask the  
21 certified question?

22 MR. ELWOOD: I don't think that they need  
23 to because that is something that, again, it would be  
24 a useful thing given that there are 50 legislatures  
25 out there and there are probably at least 20 and

1 perhaps 31 similar statutes that rather than certify  
2 the question and then have to certify on a  
3 state-by-state basis, just to adopt a background rule  
4 that this Court applies.

5 JUSTICE BREYER: But a background rule is  
6 awfully tough. I mean, you could have lots of shalls  
7 in all kinds of statutes. If they said shall, the  
8 sanitation department shall inspect your home for  
9 tuberculosis, maybe that does give a right. If they  
10 say to the fire department, you shall put out fires,  
11 I wouldn't think they meant that every possible  
12 homeowner had a right to a lawyer and a full judicial  
13 hearing before they go and respond to an alarm.

14 You know, I mean, it depends on the area.  
15 I don't know how to create a background rule.

16 MR. ELWOOD: Well, I think the rule that  
17 the Court could create is that in a criminal context,  
18 which is all that is at stake here, there is a  
19 background presumption that individuals lack a  
20 judicially cognizable right to arrest or prosecution.

21 For example, an arrest warrant, although  
22 there is some question about whether or not that  
23 really is mandatory. It's certainly couched in  
24 mandatory terms. It's directed to the marshal. To  
25 the marshal, you are hereby commanded to arrest Jane

1 Doe or whoever.

2 But there is a very established body of  
3 law that even the people who basically agitate for  
4 the arrest warrant don't have a grounds to complain  
5 if the arrest warrant isn't executed.

6 At the federal level, there is Leek versus  
7 Timmerman, where the court held there is no  
8 protective interest or there is no cognizable  
9 interest in the arrest of another party. And at the  
10 state level, there is a lot of case law indicating  
11 that officers are not liable to private citizens for  
12 failure to execute arrest warrants.

13 JUSTICE STEVENS: But is it not true that  
14 the Colorado legislature could create such a right if  
15 it did it with sufficient specificity?

16 MR. ELWOOD: I think that that is correct.  
17 This Court has not placed really many limits on what  
18 kind of rights could be created under Roth. There is  
19 some indication in cases like Sandin that there might  
20 be limits at the margins or rather at least limits  
21 presumptively --

22 JUSTICE SCALIA: The Constitution does say  
23 property right. I mean, it has to be a property  
24 right, doesn't it? Is that meaningless? Is  
25 everything in the world either life, liberty or

1 property? Does that describe everything in the  
2 world?

3 MR. ELWOOD: Justice Scalia, all I'm  
4 saying is that the Roth cases haven't really  
5 indicated that there might be limits on that. I  
6 think that there are reasons --

7 JUSTICE SCALIA: Well, because there has  
8 been no case that really did not involve something  
9 that could reasonably be called property.

10 MR. ELWOOD: Correct. And I think that  
11 this is a case where courts might want to exercise  
12 some caution because there is a reason why they don't  
13 involve private citizens in the prosecution. And  
14 that is because our system is built around the idea  
15 that to -- basically, we want to interpose brakes  
16 between the complaining witness and the courts and  
17 power of the state, as the Court indicated in *Young*  
18 *versus United States ex rel. Vuitton*. The prosecutor  
19 there, because it was a prosecutor, basically serves  
20 as a circuit breaker to prevent people from  
21 going straight to the --

22 JUSTICE SCALIA: That's the state's  
23 problem. I mean, if the state doesn't want that,  
24 sure, the state can take that away. But if the state  
25 does, do I still have to call it property just

1     because the state does?

2                   MR. ELWOOD:   I think that you would  
3     require a much clearer statement before accepting  
4     that kind of procedural innovation.   I see my time  
5     has expired.

6                   CHIEF JUSTICE REHNQUIST:   Yes, it has.  
7     Thank you, Mr. Elwood.

8                   Mr. Reichel, we'll hear from you.

9                   ORAL ARGUMENT OF BRIAN J. REICHEL  
10                   ON BEHALF OF RESPONDENTS

11                   MR. REICHEL:   Mr. Chief Justice and may it  
12     please the Court:

13                   A public high school student threatened  
14     with suspension receives more process under this  
15     Court's holding in Goss versus Lopez than Castle Rock  
16     is willing to provide to a holder of a court-issued  
17     protective order.

18                   Instead of providing Ms. Gonzales with any  
19     opportunity to be heard in any meaningful manner,  
20     Castle Rock repeatedly ignored Ms. Gonzales's pleas  
21     to have her children returned to her and the  
22     restraining order enforced.

23                   CHIEF JUSTICE REHNQUIST:   What process do  
24     you think your client was entitled to?

25                   MR. REICHEL:   We believe that what my

1 client seeks is much less than what police officers  
2 do every day. We would ask this Court to hold that  
3 Ms. Gonzales was entitled to an objective, reasoned  
4 and good faith consideration of her complaint of a  
5 restraining order violation, and a good faith  
6 assessment of probable cause.

7 CHIEF JUSTICE REHNQUIST: Could that  
8 simply be made by the person on the desk?

9 MR. REICHEL: It can, Your Honor, but it  
10 needs to be a probable cause determination that is  
11 actually communicated to the holder of the  
12 restraining order, whether it be a favorable or  
13 adverse determination, there needs to be some notice  
14 provided to the holder of a restraining order of what  
15 the police officers intend to do.

16 JUSTICE BREYER: Well, does --

17 JUSTICE SOUTER: That -- no, please.

18 JUSTICE BREYER: The basic problem that I  
19 have is you just put your finger on. I mean, on your  
20 view of the facts here, which I will accept, it's  
21 outrageous what happened and a terrible tragedy, but  
22 it wasn't that they didn't hear her. They heard her.  
23 That's the problem. They heard her and they didn't  
24 do anything.

25 So if you proceed under state law, you

1 will, if you're right, get a holding that the police  
2 behaved very badly, that would help your client, and  
3 it would help future people in the same position.

4           If you proceed under federal law, the most  
5 you get is somebody at the desk saying, well, we  
6 think other things are more important. And at that  
7 point, your client may or may not be helped and other  
8 people won't be helped. So don't you have a misfit  
9 between the remedy that you're trying to get and the  
10 harm that was done?

11           MR. REICHEL: No, Your Honor, I don't  
12 believe so. We're asking for a specific process  
13 here. And Ms. Gonzales wants the right to prove a  
14 pattern and practice on the part of Castle Rock of  
15 not responding properly to complaints and pleas of  
16 this type.

17           JUSTICE SOUTER: But that's not the kind  
18 that you've brought, as I understand it. As I  
19 understand it, you've brought a claim simply that she  
20 was hurt and was not given process. That's all you  
21 have to prove. If you can prove a pattern, sure,  
22 it's easy to prove an individual case. But your only  
23 claim is damage as a result of a denial of some  
24 procedural right in this case, isn't that correct?

25           MR. REICHEL: As the case stands now, it

1 is a Monell claim, Your Honor. It is a pattern and  
2 practice claim.

3 JUSTICE SOUTER: But it's not a class  
4 action, is it? It's not a claim under some  
5 statute -- civil rights statute. It's a claim for  
6 the benefit of this client and if this client wins,  
7 this client presumably will get a money judgment,  
8 isn't that the case?

9 MR. REICHEL: Yes, you are correct, Your  
10 Honor. You are correct. But the ignoring here, the  
11 allegations in the complaint, Your Honors, is that  
12 Castle Rock has this custom and policy, this pattern  
13 and practice of just ignoring these types of  
14 complaints. And the ignoring, as the law enforcement  
15 amicus brief filed on our behalf points out, the  
16 ignoring is a classic example of how police have  
17 traditionally responded to these types of complaints.

18 JUSTICE SOUTER: I'll grant you that, but  
19 as I understand it, what stands between or what would  
20 stand between your ignoring complaint and success  
21 would simply be the police's statement of a reason  
22 because, as I take it, I take it that you don't deny  
23 she was heard, they answered the phone, they talked  
24 to her. She got a result.

25 After she had talked with them on the



1 phone, she knew that they weren't going to do  
2 anything or that they weren't going to do anything  
3 satisfactory. So as I understand it, on your theory,  
4 the only thing she didn't get that she would be  
5 entitled to would be a statement by them as to why  
6 they were not going to do something for her. Is that  
7 what it boils down to?

8 MR. REICHEL: No. What it boils down to,  
9 Your Honor, is we're looking for a probable cause  
10 determination to be made in good faith.

11 JUSTICE SOUTER: And if they had said, we  
12 don't think there is probable cause, that would be  
13 the end of your case.

14 MR. REICHEL: As long as there was a good  
15 faith determination. If there was a mistaken belief  
16 that there was a lack of probable cause, then there  
17 is no violation of due process. The process has been  
18 provided.

19 JUSTICE BREYER: Suppose they just say,  
20 look, in our experience, children come home in two or  
21 three hours and, moreover, we have other things to do  
22 that are more important. Is that a sufficient  
23 answer? Both things, by the way, most people who  
24 look into this would say are completely wrong. But I  
25 mean, the police would say just what I said. Is that

1 sufficient?

2 MR. REICHEL: No, Your Honor, that is not  
3 a thoughtful, objective --

4 JUSTICE BREYER: So what you really want  
5 is what they should do, is they should respond?

6 MR. REICHEL: They should respond by  
7 making an objective probable cause determination --

8 JUSTICE BREYER: But in this case, you  
9 would say they should respond?

10 MR. REICHEL: They should have made the  
11 probable cause determination.

12 JUSTICE KENNEDY: But then your complaint  
13 is the result, not the procedure. It's true that a  
14 procedural case is designed so that the right result  
15 can be reached most of the time. I understand that.  
16 But all we ask is whether or not the procedure was  
17 added.

18 MR. REICHEL: There was no procedure here,  
19 Your Honor, and that's the point of our lawsuit is  
20 that the fact that Castle Rock has an official custom  
21 and policy of ignoring, of not applying any procedure  
22 to these types of claims is the crux of our complaint  
23 in this case.

24 JUSTICE SCALIA: Why was your procedure,  
25 assuming you're entitled to a procedure, why did it

1 have to come from Castle Rock? Why wasn't your  
2 proper recourse to the court that issued the  
3 restraining order? Did you try to do that, to go to  
4 the judge that issued the restraining order and say,  
5 the police are not enforcing the restraining order  
6 that you issued, I would like directive from the  
7 court that they enforce it?

8 MR. REICHEL: At the point at which she  
9 realized the police weren't really going to do  
10 anything, she found out her children were dead. That  
11 would have been at that point in time a meaningless  
12 process.

13 JUSTICE SCALIA: Well, just as she could  
14 have complained to the police earlier, she could have  
15 gone to the court earlier when she saw that the  
16 police weren't doing anything.

17 MR. REICHEL: But the police told her to  
18 continue to wait. They strung her along, Your Honor.  
19 That's -- the crux of the problem here is that she  
20 relied upon the police to enforce her restraining  
21 order. They told her to hold on --

22 JUSTICE SCALIA: That may be a tort, but  
23 it's not necessarily a denial of process if the  
24 proper place to seek that process was from the court  
25 that issued the restraining order.

1                   MR. REICHEL: But the restraining order  
2 has no meaning, Your Honor, unless the police are  
3 willing to enforce it.

4                   JUSTICE SCALIA: That's right, and the  
5 court can make sure that they enforce it upon  
6 complaint.

7                   MR. REICHEL: In this case, it's our  
8 position that the legislature has done so as well.

9                   JUSTICE SOUTER: Let me ask you a question  
10 that is suggested by Justice Scalia's question. And  
11 it goes basically simply to the practical problems  
12 that your position seems to entail.

13                   You answered him by saying that the point  
14 at which she realized they were denying her whatever  
15 she was entitled to was the point at which the  
16 children were dead. How would a reviewing court know  
17 when this particular right had been denied?

18                   I take it from your answer to Justice  
19 Scalia that there had not been a denial of the right  
20 and hence a violation of procedural due process after  
21 the first telephone conversation. I take it from  
22 your answer that there wasn't one after the second  
23 conversation. And I take it the only -- that there  
24 was no ripening, as it were, of the facts into a  
25 denial of what she was entitled to until the 3:00

1 a.m. call, is that correct?

2 MR. REICHEL: No, Your Honor, and I  
3 apologize if I misstated -- if I gave you that  
4 impression.

5 JUSTICE SOUTER: Well, my general  
6 question, then, is how does a reviewing court  
7 determine when or the point at which there has been a  
8 denial?

9 MR. REICHEL: The initial contact with the  
10 police department we're saying has to involve  
11 appropriate processes --

12 JUSTICE SOUTER: So following the first  
13 phone call, they would have to have made an express  
14 probable cause determination?

15 MR. REICHEL: They would have had to have  
16 made a probable cause determination in good faith and  
17 conveyed and communicated --

18 JUSTICE SOUTER: And communicate that to  
19 her.

20 MR. REICHEL: Communicated that to her,  
21 which they never did. Instead they just kept telling  
22 her, you can call back later, call back later. They  
23 never made the probable cause determination and  
24 conveyed it to her.

25 CHIEF JUSTICE REHNQUIST: Did they simply

1 have to take her word as to the facts on the probable  
2 cause issue?

3 MR. REICHEL: No, not at all, Your Honor,  
4 and I believe that the whole intent of Goss versus  
5 Lopez was to allow a high school student to  
6 understand the interpretation of the principal's view  
7 of the facts, and allow the student the opportunity  
8 to clarify or to fill in any missing points in terms  
9 of the understanding being --

10 JUSTICE BREYER: That's true, but Goss  
11 versus Lopez, to my knowledge -- you may know more  
12 about it. But to my knowledge, there are not a lot  
13 of federal cases which second guess the principal or  
14 the teacher, once the teacher or the principal gives  
15 a plausible reason for suspending the student.

16 And of course my fear is that that is  
17 precisely what would occur here. There would be  
18 procedure, there would be a reason. The reason is  
19 we're too busy. All right? And courts won't second  
20 guess that.

21 But if you take the other route, you get  
22 what you need, which is an instruction to the police  
23 department that when a child is missing, you don't  
24 wait. But I don't see how you can get that  
25 instruction on this procedural route.

1                   MR. REICHEL: Your Honor, we're not asking  
2 for the Court to instruct the police department they  
3 have to --

4                   JUSTICE BREYER: Exactly. And that seems  
5 to me to be the problem, because you have a case  
6 where the problem was the delay and that's apparently  
7 a common problem. And I don't see how this route  
8 that you take gets at that problem.

9                   MR. REICHEL: Your Honor, if I could  
10 respond, the delay issue is not the crux of the  
11 problem. The crux of the problem is that the police  
12 officers here never told Ms. Gonzales that they  
13 believed that there was or was not probable cause.

14                  JUSTICE SOUTER: What good could that have  
15 done anyone?

16                  MR. REICHEL: It would have allowed her  
17 the opportunity --

18                  JUSTICE SOUTER: She knew, as it was, that  
19 they weren't going to do anything. What good would  
20 it have done her to know that, oh, it's nice to know  
21 that they've gone through a probable cause  
22 determination in coming to the conclusion that  
23 they're not going to do anything. I mean, what is  
24 the social value of that?

25                  MR. REICHEL: Your Honor, I don't believe

1 the record is such that we've alleged that  
2 Ms. Gonzales knew that they weren't going to do  
3 anything. In fact, it's just the opposite, that she  
4 relied upon --

5 JUSTICE SOUTER: They said call back in  
6 two hours and whatnot.

7 MR. REICHEL: And she continued to do  
8 that, to follow their instructions.

9 JUSTICE SOUTER: And each time at the end  
10 of the call, she knew that they weren't going to do  
11 -- they weren't going to go out and look and they  
12 weren't going to enforce the order at that point,  
13 didn't she?

14 MR. REICHEL: I'm not sure that's correct.

15 JUSTICE SOUTER: I mean, I can understand  
16 you're making an argument -- you have made it, but I  
17 can understand you're making an argument that the  
18 point of procedure is to force people, in this case  
19 the police, to face facts. If they really know that  
20 she has made out probable cause that something is  
21 wrong here, if they are forced to face that as a  
22 result of procedure, they will then do something  
23 about it. It's not as easy to be irresponsible in  
24 that case.

25 But the trouble with that argument, it



1 seems to me, although it's sound as far as it goes,  
2 is that it's an argument that would apply with  
3 respect to every statute in which there is mandatory  
4 language to the police to enforce it.

5 And that seems to me to suggest a  
6 completely nonadministerable system and one which is  
7 totally at odds with the normal accord of police  
8 discretion.

9 MR. REICHEL: Your Honor --

10 JUSTICE SOUTER: I mean, how do you get  
11 around that dilemma?

12 MR. REICHEL: We believe that the process  
13 test that we're articulating here is unique to  
14 domestic violence mandatory arrest statutes across  
15 the country. The reason being is that these statutes  
16 were enacted precisely because of this problem, the  
17 problem of --

18 JUSTICE SOUTER: Then why weren't they  
19 enacted with an express provision saying, and by the  
20 way, the police have got to go, either through the  
21 following procedure or, by the way, this statute  
22 creates a right on the part of the protected party.

23 In other words, if the response to what I  
24 understand the problem to have been, if the response  
25 was the response that you think the legislature made,

1     why didn't the legislature say something that would  
2     take these statutes out of the run of the mill  
3     criminal law statutes in which the police, subject to  
4     mandatory language, have an apparent obligation to do  
5     something to enforce?

6                 MR. REICHEL:  I would respectfully submit,  
7     Your Honor, that they have, especially in Colorado.  
8     This statute is much more detailed than a run of the  
9     mill criminal or civil statute.

10                JUSTICE SOUTER:  But it doesn't say that  
11    people like your client have a personal right to  
12    enforcement with a damage remedy.

13                MR. REICHEL:  It doesn't, Your Honor, but  
14    the fact that there is a court order here in place  
15    individualizes the entitlement.  It makes it  
16    personal.

17                Ms. Gonzales went into court and aired her  
18    dirty laundry under the assumption, mistakenly here,  
19    that she was going to be provided protection from the  
20    state.  That if she went in and explained the  
21    situation to the courts, the courts would issue her  
22    an order that meant something.  And it could only  
23    mean something if police officers are willing to  
24    enforce it.  The legislature in turn has said, if a  
25    person has this kind of order, you shall use every

1 reasonable means to enforce it.

2 Now, in order to enforce it, the police  
3 officers are going to have to, as they respond to  
4 every criminal complaint, make an initial probable  
5 cause determination. That's part of every day law  
6 enforcement.

7 JUSTICE SCALIA: Mr. Reichel, how would  
8 you describe, briefly, the property that your client  
9 has been deprived of? What is the property?

10 MR. REICHEL: The property is an  
11 entitlement to enforcement of her order. That's the  
12 property, Your Honor. That's how it was --

13 JUSTICE SCALIA: The entitlement to  
14 enforcement of an order is property? Do you know any  
15 case that is -- what's the closest case that you  
16 would say has held something to be property that is  
17 an entitlement to have an order enforced as opposed  
18 to an entitlement to a job, an entitlement to money,  
19 an entitlement to what I would consider property?

20 MR. REICHEL: There is no opinion of this  
21 Court that talks about orders per se. There is,  
22 however, what I would classify as a more quirky  
23 property interest, and that was the Logan versus  
24 Simmerman Brush case. That case dealt with the  
25 situation where there was a statute that provided a

1 cutoff for when somebody could sue for unemployment  
2 benefits or discriminatory allegations in the State  
3 of Illinois.

4 And the court there held that while there  
5 is really a right in this process, to go through this  
6 process and by cutting it off without any opportunity  
7 for notice or a hearing, the State of Illinois --

8 JUSTICE SCALIA: Yeah, but it's, at the  
9 end of the day, they were unemployment benefits,  
10 right? I mean --

11 MR. REICHEL: That's true.

12 JUSTICE STEVENS: Wouldn't the better  
13 analogy be to assume she made a contract with a  
14 private detective agency to protect her from these  
15 events. And if something arises, to go get the  
16 police and act on it? That would be a property right  
17 if she had a private contract with a private  
18 detective agency to do exactly what the police were  
19 supposed to do here.

20 MR. REICHEL: Well, Your Honor, that's  
21 true, although when she went into court, I think she  
22 believed that she had a contract with the State of  
23 Colorado, at least a promise by the State of Colorado  
24 that she would obtain some protection.

25 JUSTICE STEVENS: But it seems to me a

1 contract for protection would be a familiar kind of  
2 property, is what I'm suggesting.

3 MR. REICHEL: Exactly. Exactly. And here  
4 the order --

5 JUSTICE SCALIA: But there is no contract  
6 here, is there?

7 MR. REICHEL: There is no contract but  
8 there is an order. There is a court issued order  
9 based upon her allegations and based upon her  
10 submissions to the court.

11 Your Honors, again, Ms. Gonzales took the  
12 risk here of seeking an order of protection and  
13 airing her dirty laundry in public, and she did so  
14 with the reasonable expectation that the order meant  
15 something, that law enforcement would enforce it.

16 JUSTICE GINSBURG: Could you be precise  
17 about what is the due process? You're saying it's  
18 not a hearing that you're seeking. Not just that she  
19 could be listened to and no action taken. But what  
20 precisely is the process to which she is due?

21 MR. REICHEL: We believe that there has to  
22 be an objective, thoughtful, reasoned evaluation of  
23 her complaint of a violation. And that involves  
24 necessarily an evaluation in good faith of probable  
25 cause, a determination of whether probable cause

1 exists, an articulation of that determination --

2 CHIEF JUSTICE REHNQUIST: But you said a  
3 moment ago, this could be done by the sergeant on  
4 duty at the desk who probably had three other calls  
5 waiting. Do you still think that could be done?

6 MR. REICHEL: Certainly, Your Honor. I  
7 believe if you take a look at some of the model  
8 policies already in place by police departments  
9 around the country that are attached to the amicus  
10 brief of the law enforcement agencies that filed on  
11 our behalf, you'll see some policies whereby the  
12 person at the desk taking the information is required  
13 to have certain types of questions and provide  
14 certain types of responses to those questions.

15 JUSTICE GINSBURG: But on any timetable?

16 MR. REICHEL: Yeah, we're not asking for  
17 the police department to drop everything. We're just  
18 asking that they --

19 JUSTICE STEVENS: If I understand your  
20 position correctly, I know what the allegations are  
21 here, but if the evidence should show later on that  
22 in response to one of these telephone calls, the desk  
23 sergeant said, send a squad car out and see if you  
24 can locate the kids, you would lose?

25 MR. REICHEL: No, Your Honor, that's not

1     what I'm saying.

2                   JUSTICE STEVENS:   Because that would have  
3     been a good faith response by somebody to try and  
4     find out whether there was probable cause.

5                   MR. REICHEL:   There has to be an  
6     articulation of the determination of probable cause  
7     to the holder of the restraining order to allow her  
8     to, for example, clarify facts, to perhaps talk to a  
9     superior or perhaps, in this case, go somewhere else  
10    for help, go to the court.

11                  JUSTICE GINSBURG:   but where do you get  
12    that?  I know that the Tenth Circuit tried to stick  
13    to the language of the statute.  But where do you get  
14    the requirement, A, that police inform her and, B,  
15    that it give reasons for nonenforcement?  Those were  
16    not within what the Tenth Circuit said.

17                  MR. REICHEL:   I believe it was wrapped  
18    within the concept of a probable cause determination.  
19    And they did specifically state that if there was an  
20    adverse determination, that notice of that  
21    determination has to be conveyed to her.  That was, I  
22    believe, the fourth prong of our analysis.

23                  JUSTICE GINSBURG:   So the notice -- yeah,  
24    did it say with a statement of reasons?

25                  MR. REICHEL:   With a statement of reasons,

1 it did, Your Honor.

2 JUSTICE GINSBURG: Where does that come  
3 from?

4 MR. REICHEL: Well, the statement of  
5 reasons, Your Honor, allows again for there to be  
6 communication on both sides. So that if the  
7 statement of reasons turned out to be based upon  
8 false information --

9 JUSTICE GINSBURG: I know that it would be  
10 a fair process that you're describing.

11 MR. REICHEL: A meaningful process.

12 JUSTICE GINSBURG: But is it an essential  
13 one, that is, that nothing spells out -- in most of  
14 the cases that involve property and a procedural due  
15 process right, it's a hearing that the person is  
16 seeking. Are they entitled to benefit or are they  
17 not? But here, this is not what you want. You want  
18 the police to enforce. And if they don't enforce, to  
19 give you a reason.

20 MR. REICHEL: Well, I believe that the  
21 enforcement of the order flows from the probable  
22 cause determination. The obligation to enforce is  
23 triggered by a finding of probable cause of a  
24 violation.

25 So the process we're looking for involves



1 the probable cause determination. It's our position  
2 that by simply ignoring that process, you're  
3 depriving somebody potentially of their property  
4 right in enforcement of the order.

5 JUSTICE GINSBURG: But if the police --  
6 let's say, focusing on this case, suppose they had  
7 looked at this order and said, wow, it gives him  
8 weekends with the girls, it gives him summertime with  
9 the girls and, subject to his ex-wife's agreement,  
10 dinner time with the girls, this can't be all that  
11 urgent because if he would harm the girls then why is  
12 the judge allowing him so much sole time with them?

13 So wouldn't -- looking at this particular  
14 order, wouldn't there be reasons why the police would  
15 say, the judge is allowing the father to spend time  
16 with the girls, this can't be that urgent?

17 MR. REICHEL: There could have been, Your  
18 Honor, but again, those reasons were never  
19 articulated to my client and any reasons the police  
20 officers may have had are not in the record.

21 JUSTICE O'CONNOR: But this is such a new  
22 sort of a requirement you're seeking us to develop  
23 here. I just don't know of any past case that would  
24 suggest such a requirement when it comes to law  
25 enforcement requests by citizens of police. It would

1 be a major step, wouldn't it?

2 MR. REICHEL: It would be a different kind  
3 of case, Your Honor.

4 JUSTICE O'CONNOR: Yes. Are there any  
5 indications that any of the police in this instance  
6 will face disciplinary action for their response  
7 here?

8 MR. REICHEL: I really have no idea, Your  
9 Honor. I really have no idea.

10 JUSTICE BREYER: Could you still bring a  
11 state tort suit?

12 MR. REICHEL: No, Your Honor. I believe  
13 that as was conceded in Petitioner's reply brief,  
14 they're really under our governmental immunity laws.  
15 They're probably the strictest in the country. There  
16 really is no viable tort --

17 JUSTICE BREYER: Why? Because it is  
18 willful and wanton, and you've made out a claim they  
19 didn't even give an answer, they didn't do anything,  
20 they have a practice of doing nothing.

21 MR. REICHEL: I believe that centers more  
22 around the causation and foreseeability issues that  
23 are triggered by that type of a claim.

24 JUSTICE KENNEDY: Well, if the state cares  
25 so little about enforcing what its officers do under

1 its own laws, isn't that some indication that it did  
2 not intend to create the property interest that  
3 you're arguing for?

4 MR. REICHEL: No, Your Honor, I don't  
5 believe that at all. And in fact, again, going back  
6 to some of the Court's prior cases and the Roth  
7 series of case law, if you look, for example, at  
8 Logan versus Simmerman Brush, there was a good deal  
9 of discussion about whether there was a tort law  
10 remedy and, in fact, there was in that case.

11 CHIEF JUSTICE REHNQUIST: Do you have any  
12 other cases besides Logan?

13 MR. REICHEL: On that issue?

14 CHIEF JUSTICE REHNQUIST: Yes.

15 MR. REICHEL: Not with that elaborate of a  
16 discussion on the issue, although I would submit that  
17 the existence of a post-deprivation remedy, so to  
18 speak here, is irrelevant under, again, Logan, simply  
19 because we're left now with the Monell claim. We're  
20 left with the allegations of state action, a custom  
21 and policy of a state entity here.

22 And the existence of a post-deprivation  
23 state law tort remedy is irrelevant to the analysis  
24 of whether there is a due process violation.

25 JUSTICE GINSBURG: If there had been a

1 question certified to the Colorado Supreme Court, and  
2 the Colorado Supreme Court said we weren't intending  
3 to create any entitlement here, evidence that we  
4 don't even have a tort action that's willful or  
5 wanton conduct, no liability at all in the  
6 municipality. So suppose the State Supreme Court has  
7 said, we didn't mean to create any entitlement, then  
8 where would you be?

9 MR. REICHEL: We probably wouldn't be  
10 here, Your Honor. That question simply never got  
11 certified to the Tenth Circuit. And I believe you do  
12 have to give deference to the Tenth Circuit's  
13 analysis of Colorado law on that issue.

14 Your Honors, at issue here is a specific  
15 order of protection, a legislative mandate requiring  
16 enforcement of a protective order and a pattern and  
17 practice of the Castle Rock police department of  
18 ignoring and failing to enforce court issued  
19 protective orders.

20 This case does not turn on decisions made  
21 by police officers based solely on the facts of this  
22 case. This case involves allegations of a pattern  
23 and practice, an official policy and custom on the  
24 part of Castle Rock of not taking complaints of  
25 restraining order violations seriously.

1           This pattern and practice that's -- in and  
2 of itself proves there was no process. Ms. Gonzales  
3 merely seeks the opportunity to prove at a trial on  
4 the merits that no matter what she said to the Castle  
5 Rock police officers, they were not going to do  
6 anything about her --

7           JUSTICE STEVENS: May I ask you whether  
8 you would favor or disfavor our certifying the  
9 question whether there is a property right here to  
10 the Colorado Supreme Court?

11           MR. REICHEL: At this point in time, I  
12 suppose I would disfavor it, because I believe that  
13 Bishop versus Wood is controlling. Your Honors, we  
14 respectfully request that this Honorable Court affirm  
15 the Tenth Circuit's ruling in this matter.

16           CHIEF JUSTICE REHNQUIST: Thank you,  
17 Mr. Reichel. Mr. Eastman, you have four minutes  
18 remaining.

19           REBUTTAL ARGUMENT OF JOHN C. EASTMAN

20           ON BEHALF OF PETITIONER

21           MR. EASTMAN: Thank you, Mr. Chief  
22 Justice. I want to go back to Justice Scalia's point  
23 about the property interest. This is such a unique  
24 claim of a property interest. I think it would be  
25 appropriate to find that even if you were to accept

1 Justice Stevens' contention of a contract, an ADT  
2 type of guarantee of protective services, that looks  
3 a lot more like the type of entitlements under Roth  
4 that this Court has recognized.

5 I think it may well be the case that you  
6 never reach a property interest in the enforcement  
7 against somebody else, that that's a different thing  
8 in kind from this traditional contract protective  
9 services.

10 So if there was a statute that said, when  
11 somebody has a protective order that implicates --  
12 particularly when there is a finding of dangerousness  
13 that's been made by a court that has nothing to do  
14 with the restraining order that was issued here, and  
15 that the police are obligated to provide 24-hour,  
16 seven days a week police -- squad car out in front of  
17 her house until she goes to testify at a hearing, for  
18 example, that would be I think a property interest.

19 But it would meet the criteria that this  
20 Court set out in Gonzaga, that it's defined in terms  
21 of rights to her, not just benefits that might flow  
22 from a criminal law more generally.

23 It's phrased in terms of the person  
24 benefitting and it has an unmistakable focus. That's  
25 the phrase from Gonzaga. And that there is an intent

1 to create a private remedy as well, not just the  
2 private right. I think those kind of things would  
3 give rise to a Roth type property interest that would  
4 lead to the invocation of procedural due process  
5 requirements.

6 JUSTICE BREYER: What about the willful  
7 and wanton -- suppose the facts were just as they  
8 say, long-standing practice, not responding, doing  
9 nothing, doing nothing here despite evidence of  
10 serious danger, and being told you shouldn't do  
11 anything, don't pay any attention he'll come home,  
12 would that show willful and wanton?

13 MR. EASTMAN: I believe under Colorado  
14 law, that would show willful and wanton and their  
15 tort claim would be available against the police.  
16 But it's precisely because of that tort claim is  
17 available and only on those limited circumstances  
18 that I think you cannot read the Colorado legislature  
19 as having created a property interest here, because  
20 the remedies that would be available would not be so  
21 limited.

22 We would not be limited to willful and  
23 wanton conduct. We would have all sorts of remedies  
24 beyond what the State of Colorado specifically said.  
25 And you would go a long way toward making

1 constitutional provisions the font of Colorado tort  
2 law, and completely supplant --

3 JUSTICE STEVENS: May I ask you the same  
4 question I asked your opponent? Would you favor or  
5 disfavor our certifying the property law issue to the  
6 Colorado Supreme Court?

7 MR. EASTMAN: Disfavor. I think there is  
8 nothing in this statute that would even make it  
9 reasonable for the Colorado Supreme Court to hold  
10 that there is a property interest here.

11 And to go back to your earlier point about  
12 Bishop, it's not a determinative rule. You give  
13 deference to the Tenth Circuit. But when the Tenth  
14 Circuit's decision is not based on any even  
15 developments in Colorado law, and based on a Colorado  
16 statute and takes the step that this statute simply  
17 doesn't comply with, I don't think you need to give  
18 the kind of absolute deference here that you might  
19 have given other cases.

20 CHIEF JUSTICE REHNQUIST: Thank you,  
21 Mr. Eastman. The case is submitted.

22 (Whereupon, at 10:59 a.m., the case in the  
23 above-entitled matter was submitted.)

24  
25